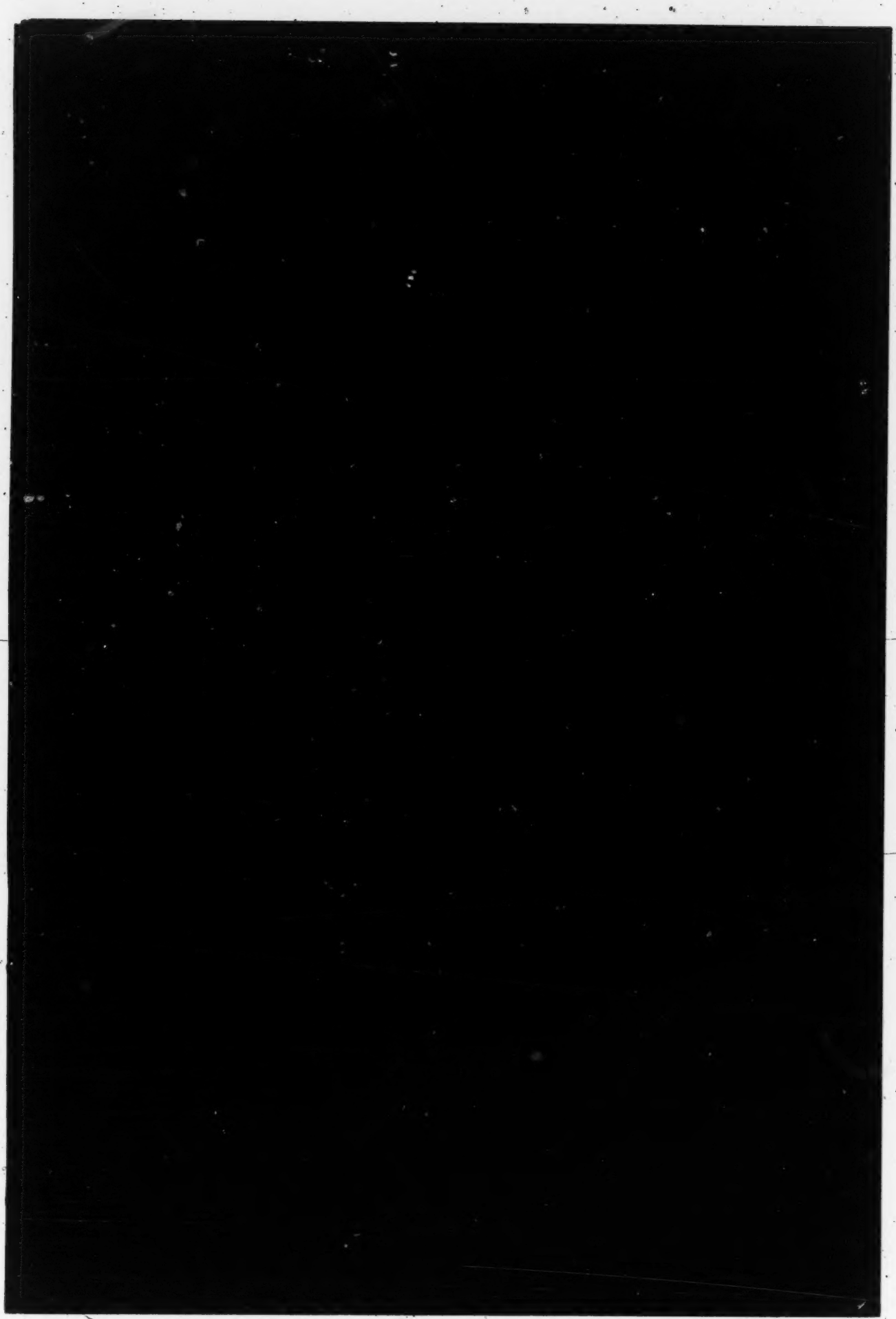

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON AND JOHN L. GLENN,

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JOINT MOTION TO ADVANCE

The Appellants, Henry J. Toombs, et al. and the Appellees, Ben W. Fortson, Jr., Secretary of State of Georgia, et al. jointly move this Court to advance consideration of the above case, and in support thereof respectfully show the Court as follows:

1.

This is an appeal from a decision of the United States District Court for the Northern District of Georgia entered on March 25, 1966, in which that Court denied in part a motion to modify its previous order of April 1, 1965, which allowed the General Assembly of Georgia to use a reapportionment plan, which failed to fully meet constitutional standards, on an interim basis until May 1, 1968. The District Court did rule that full reapportion-

ment must be enacted by May 1, 1967, for the November 1968 General Election, but refused to order further immediate reapportionment for the 1966 elections.

2.

Primary elections of candidates for the General Assembly are scheduled for September 14, 1966, and all candidates must qualify at least 90 days prior thereto, June 15, 1966.

3.

An expeditious decision of the question presented by this appeal will be in the best interest of the parties in that it will dispel confusion in the minds of the electorate caused by this pending appeal.

WHEREFORE, the Appellants and the Appellees, respectfully pray that this case be advanced on the calendar and heard at the earliest possible time.

Respectfully submitted,

FRANCIS SHACKELFORD
Attorney for Appellants

ARTHUR K. BOLTON
Attorney General of Georgia
Attorney for Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

On March 25, 1966, the United States District Court for the Northern District of Georgia entered a judgment in which it refused to require valid reapportionment of each house of the General Assembly of Georgia prior to the two-year elections in 1966 and sanctioned the continued use of the unconstitutional apportionments of the Georgia House and Senate until January, 1969. This is an appeal from that judgment.

OPINION BELOW

The opinion and judgment of the District Court of March 25, 1966, which is not yet reported, is reproduced as Appendix A hereto. Earlier opinions in this case are reported as *Toombs* v. *Fortson*, 205 F.Supp. 248 (N.D. Ga.

1962); *Fortson* v. *Toombs*, 379 U.S. 621 (1965); and *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965).

JURISDICTION

This action was brought on April 4, 1962, pursuant to 42 U.S.C. §1983 by the Appellants, residents and qualified voters of the two most populous counties in Georgia, to have the discriminatory apportionments of the Senate and House of Representatives of the General Assembly of Georgia declared unconstitutional under the Fourteenth Amendment to the Constitution of the United States. A District Court of three judges was convened pursuant to 28 U.S.C. §2281 and its jurisdiction of this action was predicated upon 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §2201. The judgment of the District Court from which this appeal is taken was entered on March 25, 1966, and a notice of appeal was filed in that court on March 28, 1966.

The jurisdiction of the Supreme Court to review the decision by appeal is conferred by 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case. *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962).

QUESTIONS PRESENTED

1. Whether the District Court, after holding the apportionments of both the House and the Senate of the Georgia General Assembly to be unconstitutional and permitting the 1965 one-year elections to proceed under the invalid plans, abused its discretion when it further permitted the two-year general elections scheduled for

September and November, 1966, to be conducted under the invalid plans, thus, postponing fair representation of the plaintiffs in the General Assembly in accordance with the decisions of this Court until at least January, 1969.

2. Whether, after finding the apportionments of both the House and Senate of the Georgia General Assembly to be unconstitutional on April 1, 1965, the District Court abused its discretion when it approved the continued use of these invalid apportionments on an interim basis for the two-year general elections in 1966, thus postponing fair reapportionment of the Georgia General Assembly until at least January 1969, notwithstanding the decision of this Court in *Swann* v. *Adams*, __U.S.__ 34 U.S. Law Week 3291 (1966).

3. Whether, in view of the fact that fair representation of the plaintiffs in the Georgia General Assembly has not yet been achieved, although this litigation was commenced in April of 1962, the further postponement and delay by the District Court of valid reapportionment until at least January 1969, constitutes a denial of Due Process and Equal Protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

STATUTES INVOLVED

The statutes directly involved are the Reapportionment of Senate, Georgia Laws 1962, September-October Extraordinary Session, page 7 (codified as Georgia Code Ann. §47-102), and the Reapportionment of the House of Representatives, Georgia Laws 1965, page 127 (codified as Georgia Code Ann. §47-101) both of which were held unconstitutional by the District Court on April 1, 1965. *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965).

STATEMENT OF THE CASE

On April 4, 1962, the Appellants, qualified voters residing in Georgia's two most under-represented counties, brought this action to compel fair reapportionment of both houses of the Georgia General Assembly in accordance with the requirements of the Equal Protection Clause of the Constitution.

For almost 95 years, the seats in the Georgia House of Representatives had been apportioned under an arbitrary 3-2-1 system under than 22% of the people residing in 103 rural counties controlled an absolute majority of the 205 House seats. Voters residing in Echols County had almost 100 times the effective representation of the plaintiffs who resided in Fulton County.[1] Similar disparities of as much as 48 to 1 existed under the apportionment of the Senate.

On May 25, 1962, the District Court held the existing apportionment of the Georgia General Assembly to be unconstitutional and ruled "that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional standards." *Toombs* v. *Fortson*, 205 F.Supp. 248 (N.D. Ga. 1962). The court postponed further action to afford the State an opportunity to reapportion prior to the two-year general elections scheduled for November, 1962, for the term to

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[1] The glaring disparities in the apportionment of the House of Representatives under the 3-2-1 system are more fully stated in the District Court's initial opinion, *Toombs* v. *Fortson*, 205 F.Supp. 248, 251 (N.D. Ga. 1962), and are identical with the disparities existing under the Georgia county unit system. See *Gray* v. *Sanders*, 372 U.S. 368 (1963).

begin in January, 1963. In a supplemental opinion, the District Court, with Chief Judge Tuttle dissenting, declined to require both houses of the General Assembly to be apportioned more nearly on the basis of population. Order of September 5, 1962. R. 34-42.

On September 27, 1962, the General Assembly convened and, after postponing the primary elections originally scheduled for September 14, 1962, adopted a reapportionment of the more-representative Senate on October 5, 1962, leaving untouched the even more gross inequities which existed in the House. Georgia Laws 1962, September-October Extraordinary Session, page 7. Even in the Senate, however, substantial disparities remained. The largest district still exceeded the smallest by almost 2 to 1 (1.81:1), while six of the fifty four districts deviated more than 15% from average.[2]

On June 17, 1964, within two days after the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Appellants moved to compel reapportionment of the House of Representatives prior to the forthcoming two-year general elections in November 3, 1964. The appellees made no attempt to defend the constitutionality of the egregious 3-2-1 system. They asked only that reapportionment be delayed until after the 1964 elections.[3] One hundred seventy one members of the House also inter-

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[2] A more detailed analysis of the 1962 reapportionment of the Georgia Senate may be found at R. 136-40.

[3] As the court emphasized in its opinion: "The respondent, Secretary of State here contends that this is such an unusual case and that the court should not interpose any injunctive relief until after the State Legislature is given an opportunity at its regular session in 1965 to set its own House in order." Opinion of June 19, 1964, R. 50.

vened, pledging themselves to reapportion the House in accordance with constitutional standards at the 1965 session of the General Assembly.[4]

Although the General Assembly was then convened in special session,[5] and more than ample time remained prior to the elections within which fair reapportionment of the House might have been accomplished, the District Court, while declaring the apportionment of the House to be unconstitutional, refused to require that it be validly reapportioned prior to the November, 1964 elections. The court did, however, limit the terms of the Representatives to one year and expressly provided that:

> ". . . the plaintiffs shall have the right to reapply to this Court for further relief should the General Assembly, which convenes in January, 1965, fail to enact, during the regular 1965 45-day session as provided in the Georgia Constitution, such legislation as may be necessary for the General Assembly to be reapportioned *in accordance with constitutional requirements* and

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[4] "Movants allege on behalf of those who will return, and they verily believe on behalf of others yet to be elected, that in the 1965 session of the Georgia General Assembly there will be no difficulty in getting such reapportionment legislation adopted as will be necessary to comply with the Fourteenth Amendment to the United States Constitution as that Amendment is now interpreted by the Federal courts." Motion to Intervene, paragraph 11, R. 57.

[5] The General Assembly was convened in special session for the purpose of proposing an entirely new state constitution in the form of an "amendment" for ratification at the November 3, 1964 general election. In order to permit consideration of reapportionment by the special session, the Governor had only to issue a new call to its members. Ga. Const. Art. V, Sec. 1, paragraph XII, Ga. Code Ann. §2-3012.

> *as may be necessary to permit the holding of elections to the newly constituted General Assembly during the calendar year 1965*, which elections are to be held at such time as may be necessary to permit the members of such newly constituted General Assembly to take office no later than the second Monday in January, 1966."[6] (Emphasis supplied).

When the General Assembly convened in regular session in January 1965 to consider reapportionment of the House, it made no attempt to apportion the House districts "as nearly of equal population as is practicable" in accordance with the mandate of this Court in *Reynolds* v. *Sims*. Rather the General Assembly chose as its standard, not *Reynolds* v. *Sims*, but the disparities which had been created more than two years earlier in its reapportionment of the Senate.[7] The resulting apportionment of March 10, 1965, reflected this distorted philosophy. House Bill 367, Georgia Laws 1965, page 127, Ga. Code Ann. §47-101, R. 80. On March 10, 1965, the Appellees moved for confirmation of this act by the District Court, R. 76.

Under House Bill 367, the largest districts still exceed the smallest by more than 2 to 1 and an absolute majority of 103 of the 205 House seats could be elected by only 42% of the people. Two-thirds of the districts (143) deviate more than 10% from average; almost one-half

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[6] The court also enjoined the defendants from placing the proposed new state constitution, which had been drafted by the badly malapportioned legislature, on the ballot for ratification in the form of a package amendment. After the November 3, 1964 election, that injunction was vacated by this Court. *Fortson* v. *Toombs*, 379 U.S. 621 (1965).

[7] See *Toombs* v. *Fortson*, 241 F.Supp. 65, 69 (N.D. Ga. 1965).

(96) deviate more than 15% from average, while one-third of the districts (71) deviate more than 20% from average. R. 141.

House Bill 367 presents a consistent pattern of county-based over-representation of rural areas and under-representation of urban areas. Six of the seven metropolitan counties of the State continue to be under-represented by more than 15%. The 36 districts in Fulton or DeKalb Counties (Atlanta) in which the appellants reside, have an average population of 22,880. The 59 most over-represented counties still have 56 seats which represent an average population of only 14,766. Thus, it is clear that little has been done to shift the balance of rural power from that which existed under the 3-2-1 system, which guaranteed each county at least one seat. The 110 predominately rural counties which comprise the 74 most over-represented districts under House Bill 367 would have possessed 131 House seats under the old 3-2-1 system. Under the revised apportionment passed in 1965, these same 110 counties still possess an absolute majority of 103 House seats, although they contain only 42% of the population. These disparities have been increased even further by the continuing shifts in population which have occurred since the 1960 census.

On April 1, 1965, the District Court held the apportionments of both the House and the Senate to be unconstitutional. The court said:

> "The present plan of Senate apportionment in Georgia and the proposed plan of apportionment for the House of Representatives, separately and collectively, fall short of the mandate of the

> equal protection clause of the Fourteenth Amendment as construed by the Supreme Court in *Reynolds* v. *Sims* and related cases, *supra*," *Toombs* v. *Fortson*, 241 F.Supp. 65, 73, (N.D. Ga., 1965).

Notwithstanding its admonition to the contrary in its order of June 30, 1964, the District Court again refused to accord plaintiffs any effective relief or to interfere with the 1965 special elections to fill the remainder of the two-year terms. As in 1964, the District Court again permitted the elections to proceed under the unconstitutional apportionments not only for the one-year special elections of 1965, but also for the two-year primary and general elections to be held in September and November, 1966.

> "The present apportionment of the Senate and the proposed apportionment of the House are approved as interim plans of apportionment for the period ending with the end of the regular session of the General Assembly of Georgia for 1968 or May 1, 1968, whichever date may be earlier; without prejudice however to the right of the General Assembly of Georgia at any earlier date to alter the apportionment in either or both the Senate and House so as to more nearly comply with the subsisting constitutional requirement." *Toombs* v. *Fortson*, 241 F.Supp. 65, 73, (N.D. Ga., 1965).

The District Court expressly "retain[ed] jurisdiction over all matters and questions pending in the case" and no interlocutory appeal was taken.

The 1966 session of the General Assembly convened in January and met for 40 days until February 18, 1966, without making any attempt to reapportion itself in accordance with constitutional standards.

On February 25, 1966, this Court reversed a similar decision in *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966) which had delayed reapportionment of the Florida legislature until 1969, and the Appellants promptly moved on March 8, 1966, in the District Court for modification of the April 1, 1965 order in accordance with the decision of this Court (R. 174), and to require that the General Assembly be reapportioned in accordance with constitutional standards prior to the biennial elections which were then more than six months away.[8] On March 25, the District Court denied the Appellants' motion. Appendix A. The court said:

> "We are not inclined to grant the further relief now being sought unless substantial similarity should appear between the facts of this case and those of *Swann* v. *Adams*, as that case was presented to the Supreme Court. We do not find such similarity . . ." [Appendix A, page 27].

The court reaffirmed its former order on grounds that:

> "The substantial progress made [in the four years since 1962], and the need to adjust the 159 counties to the new system which required House districts wherein multiple counties were

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[8] Primary elections are scheduled for September 14, 1966 (Ga. Code Ann. §34-801); qualification dates for primaries will close 90 days earlier, June 15, 1966. Ga. Code Ann. §34-1006(h). The general election will be held on November 8, 1966. Ga. Code Ann. §34-103(m), §34-802.

grouped in many instances, impelled us to grant the delay for a period of adjustment, trial and study." [Appendix A, page 30].[9]

The court deemed its postponment of fair reapportionment of the General Assembly for two additional years until January, 1969 as "only a slight withholding of relief to plaintiffs." [Appendix A, page 35].

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9. In its initial opinion on April 1, 1965, the Court justified its three-year postponement of valid reapportionment on a different basis, stating: "We are persuaded to this course by the view that the General Assembly of Georgia has been inordinately involved in apportionment since 1962, and *for that reason* have concluded to withhold further action until the end of the 1967-68 regular session of the General Assembly, or May 1, 1968, whichever may be the earlier." *Toombs* v. *Fortson*, 241 F.Supp. 65, 71, (N.D. Ga., 1965) (Emphasis supplied). This ground was apparently abandoned after this Court's summary rejection of the interim plan of the Florida legislature which had been far more "inordinately involved" in reapportionment than had the Georgia General Assembly.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This action to compel fair reapportionment of both Houses of the Georgia General Assembly was brought on April 4, 1962 by the Appellants, qualified voters residing in Georgia's two most under-represented counties. Although this action has now been pending in the District Court for more than four years, the Appellants have not yet been accorded fair representation in either House of the General Assembly. And under the judgment of the District Court of March 25, 1966, the Appellants' rights to equitable representation in the General Assembly in accordance with constitutional standards, will be further suspended for at least three additional years—until the 1969-70 session of the General Assembly convening in January, 1969—while the affairs of state are conducted under an interim apportionment which all concede to be unconstitutional. This refusal by the District Court to grant effective relief for the established constitutional rights of the Appellants is in direct conflict with the decision of this Court in *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966) and constitutes an abuse of discretion.

In a series of decisions beginning with *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and culminating most recently with *Swann* v. *Adams*, __ U.S. __, 34 U.S. Law Week 3291 (1966), this Court has repeatedly emphasized that reapportionment of state legislatures in accordance with the standards of the Fourteenth Amendment must be accomplished expeditiously and without unnecessary delay. Neither considerations of legislative convenience nor of judicial deference justify the postponement of valid reapportionment where the imminence of forthcoming

elections does not make compliance with the constitutional standard impossible. As this Court emphasized in *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964):

> ". . . once a State's legislative apportionment has been found to be unconstitutional, it would be the *unusual case* in which the court would be justified in not taking appropriate action to insure that *no further elections are conducted under the invalid plan.*" (Emphasis supplied).

The only circumstances referred to by this Court as justifying a trial court in withholding equitable relief and in refusing to enjoin all further elections under an invalid plan were those in which "an impending election is imminent and a State's election machinery is already in progress." However, even this power was narrowly circumscribed, for this Court expressly held that the Alabama district court had acted with proper judicial restraint when it ordered immediate reapportionment of the Alabama legislature on July 21, 1962, "at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty," notwithstanding the fact that all candidates for election to the Alabama legislature had already been nominated in party primaries which had been held in May.

At the time of the *Reynolds* decision on June 15, 1964, Georgia's election machinery had hardly begun. Although 52 Democratic candidates for the House had already been nominated in "early primaries," the remainder of the primaries were not to be held for almost three months, until September, and the General Assembly was then convened in a special session at which the question of reapportionment might have been considered. Notwith-

standing this fact, however, the District Court, in deference to the Appellee's requests for delay, refused to require that the House be reapportioned prior to the November 1964 general elections in order to afford the General Assembly an opportunity to reapportion itself at its regular session which convened in January 1965 for a one-year term, "in accordance with *constitutional requirements.*"

Despite the assurances given the District Court on June 23, 1964 by members of the Legislature, when the General Assembly convened in January 1965, no attempt was made to apportion the House districts to be "as nearly of equal population as is practicable," as demanded by the Constitution. Instead, the General Assembly chose as its standard, not the decision of this Court in *Reynolds* v. *Sims*, but, it chose rather to follow the disparities existing under the 1962 apportionment of the Georgia Senate. Because of the glaring disparities existing in the apportionments of both the House and the Senate, the District Court on April 1, 1965, held both apportionments to be unconstitutional under the Fourteenth Amendment. However, as in 1964, the District Court again refused to afford the Appellants any effectual relief, not only for the special elections of 1965, but also for the two-year general elections of 1966, which were then more than eighteen months away. Elections under these unconstitutional apportionments were approved by the District Court on an interim basis until January, 1969.

In cases in which the imminence of impending elections made immediate reapportionment impossible, this Court has taken great care to emphasize to the lower courts that once the state legislature has been afforded an opportunity to validly reapportion itself to meet the consti-

tutional standard, it is the duty of the district courts to take appropriate steps to insure that no further elections are held under an unconstitutional scheme. Further delays in achieving constitutional compliance are not to be permitted. Thus, in the Virginia case, *Davis* v. *Mann*, 377 U.S. 678, 693 (1964), this Court directed that:

> "Since the next election of Virginia legislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for purposes of that election. *After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed,* should it become necessary, *to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme.*" (Emphasis supplied).

In the companion case, *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, 676 (1964), this Court again made it emphatically clear that under no circumstances are the lower courts given the discretion to sanction the use of invalid apportionments on an interim or transitional basis in the 1966 elections. Thus, while recognizing that "... the Maryland courts need feel obligated to take further affirmative action only if the legislatures fail to enact a constitutionally valid legislative apportionment scheme in a timely fashion after being afforded a further opportunity to do so . . . ," this Court again emphasized that:

> "However, *under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant*

> *to the existing or any other unconstitutional plan.*" (Emphasis supplied).

Similarly, in *Scott* v. *Germano*, 381 U.S. 407, 409 (1965), in vacating an order of the District Court in order to permit resolution of the problem by the Illinois Supreme Court, this Court again reiterated that the continuation of an invalid apportionment scheme in the 1966 elections is not to be tolerated out of deference to the agencies of state government. This Court said:

> "The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may *validly* redistrict the Illinois State Senate; *provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State Senate*, . . ." (Emphasis supplied).

Despite the clear mandate of these decisions, the District Court has already sanctioned not one, but two elections for members of the General Assembly of Georgia in 1964 and in 1965 under apportionments that were clearly unconstitutional; and, unless the order of March 25, 1966 is reversed by this Court, the 1966 elections for members of the Georgia Legislature will proceed under invalid plans, with the full approval of the District Court.

Any possible question as to the authority of the District Court to sanction the use on an interim basis of an unconstitutional apportionment for the 1966 general elections has been foreclosed by the decision of this Court

in *Swann* v. *Adams*, __U.S.__, 34, U.S. Law Week 3291 (1966), in which this Court summarily reversed a virtually identical order entered by a Florida district court and patterned after the April 1, 1965 order of the District Court in the present case, which sanctioned a delay in valid reapportionment until the 1969 session of the legislature. This Court said:

> "We hold, however, that in approving the plan on an interim basis, the District Court erred. This litigation was commenced in 1962. The effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969. While recognizing the desirability of permitting the Florida Legislature to itself determine the course of reapportionment, we find no warrant for perpetuating what all concede to be an unconstitutional apportionment for another three years.
>
> "We reverse and remand to the District Court so that a valid reapportionment plan will be made effective for the 1966 elections."

So far as counsel has been able to ascertain, the *Swann* case and the present case, on which *Swann* was patterned, are the only cases in which a district court has attempted to delay valid reapportionment of a state legislature beyond the 1966 elections.[10]

To attempt, as did this District Court, to distinguish the *Swann* case on grounds that the disparities in Florida were somewhat greater in the House (but less in the

[10] But see *O'Shields* v. *McNair*, __F. Supp.__ (W.D.S.C., decided February 28, 1966) in which the apportionment of the South Carolina Legislature was not challenged until 1965.

Senate) than in the present case, completely ignores the fact that the apportionments in both cases have been held to be *unconstitutional*. Once that determination has been made, the only remaining question is whether there is ample time before the next election to permit the promulgation of a valid apportionment by the court or the legislature. Where, as in the present case, there was more than ample time remaining prior to the September 14, 1966 primary elections and the general election on November 3, 1966, the District Court had no discretion. It was obligated to take appropriate steps to insure that no further elections are held under the unconstitutional plans. *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, 676 (1964); *Davis* v. *Mann*, 377 U.S. 678, 693 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).

Nor can the decision of this Court in *Swann* be disregarded because the Georgia legislature had taken slightly more substantial steps to achieve reapportionment than had the legislature in Florida. This distinction completely ignores the fact that, in each case, the orders postponing reapportionment operate *prospectively* to deny the plaintiffs of their rights to be fully and fairly represented in the 1967 and the 1968 sessions of their respective legislatures.

This is not, as suggested by the District Court, "only a slight withholding of relief to the plaintiffs." The 1967 session of the Georgia General Assembly will be an appropriations session which will adopt a budget of more than one billion dollars for the biennium. A new governor is to be elected for a four-year term in the November 1966 election, and the issues and platforms of candidates

will necessarily have to be related to the composition of the malapportioned assembly. Political alignments, programs, appropriations and policies for the full length of the new governor's term will be strongly characterized by the make up of the 1967-68 session of the General Assembly. There is little to prevent an incoming malapportioned General Assembly from again seeking to have its revision of a new constitution adopted by the electorate.[11] The consequences of the Appellants being inadequately represented in these decisions can hardly be termed "slight."

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[11] See *Fortson* v. *Toombs*, 379 U.S. 621 (1965).

CONCLUSION

In view of the fact that fair reapportionment of either House of the Georgia General Assembly has not been achieved although this litigation has been pending for more than four years, the decision of the District Court, further postponing valid reapportionment of the General Assembly until 1969, constitutes an abuse of discretion which should be reversed by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, EMMET J. BONDURANT, II, attorney for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of April, 1966, I served copies of the foregoing Motion to Advance and Jurisdictional Statement on the Appellees herein named, by mailing copies thereof in a duly addressed envelope, with postpage prepaid to Arthur K. Bolton, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia and E. Freeman Leverett, Assistant Attorney General of Georgia, attorneys of record for said appellees.

EMMET J. BONDURANT, II

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION NO. 7883

HENRY J. TOOMBS, ET AL.,

PLAINTIFFS

v.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.,

DEFENDANTS

Before TUTTLE and BELL, Circuit Judges, and MORGAN, District Judge. PER CURIAM:

OPINION AND ORDER

Plaintiffs have moved for further relief in this state legislature reapportionment litigation in light of the opinion of the Supreme Court in the Florida case of *Swann v. Adams*, 34 Law Week 3291, per curiam opinion dated February 25, 1966. They seek an order requiring immediate reapportionment of both houses of the General Assembly of Georgia so as to be effective for the 1966 elections.

We entered an order under date of April 1, 1965 approving as an interim plan the reapportionment of the Georgia Senate which was accomplished in 1962, and the reapportionment of the Georgia House which was accom-

plished in 1965. We noted that the apportionment of both the House and Senate fell somewhat short of the federal constitutional one man-one vote standard. However, it was determined that a period of trial and study of the new apportionment system was indicated so as to provide a more useful instrument of government when the General Assembly was brought within constitutional standards. We require that reapportionment be completed by May 1, 1968 so as to apply to the 1968 elections. *Toombs v. Fortson*, N.D., Ga., 1965, 241 F.Supp. 65. Plaintiffs did not appeal..

As a part of the interim plan as approved, the regular two year terms for 1965-66 of the House members were terminated and a special election was held for one year terms, i.e., for the year 1966. This one year term and the 1967-68 terms were a part of the respite granted, but the General Assembly, as reapportioned, was left free to complete the task during this period. The regular session of the Assembly of forty days for 1966 was completed prior to the filing of plaintiff's motion for further relief with which we are now concerned.

Thus a period of more than eleven months has elapsed since our last opinion and order without an appeal, a special election has taken place, and one regular session of the Assembly has been completed. However, this acquiescence in our previous order would be no bar to the further relief being sought if it should appear that the decision of the Supreme Court in *Swann v. Adams*, supra, is a binding precedent on this court, or even if it should appear to be a persuasive precedent. It is of paramount importance under our system of law that we be alert to follow Supreme Court decisions. On the other hand, our last opinion and order were entered only after full and

complete hearings, and the order represented the considered judgment of the court in applying equitable principles to the question with respect to the individual federal constitutional rights involved and the legislative process of the State of Georgia.

We are not inclined to grant the further relief now being sought unless substantial similarity should appear between the facts of this case and those of *Swann v. Adams* as that case was presented to the Supreme Court. We do not find such similarity as the following statements of facts will demonstrate. Nevertheless, further reflection has convinced us that our previous order should be modified with respect to the time within which Georgia is required to enact a constitutional plan of apportionment into law.

SUMMARY OF GEORGIA LITIGATION

This litigation was instituted by the plaintiffs on April 4, 1962 in the wake of *Baker v. Carr*, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. We promptly held a hearing and required on May 25, 1962 that either the House of Representatives or the Senate be apportioned on the basis of population. We retained jurisdiction pending action by the General Assembly to that end, and also pending decision of the Supreme Court in cases involving the contention that both houses of a state legislature must be apportioned according to population. *Toombs v. Fortson*, N.D. Ga., 1962, 205 F.Supp. 248. The General Assembly of Georgia promptly met and reapportioned the Senate on the basis of population. Ga. Laws 1962, extra session, pp. 7, 14. Senators were elected under this plan in 1962 for the 1963-64 term and this apportionment continues to date. The theoretical minimum of population

necessary to control a majority of the fifty four seats in the Senate was raised from 21.4 percent to 48.2 percent. The disparity from the standpoint of population as between districts and thus between residents of the districts was reduced from a ratio of 42.5 to 1 to a ratio of 1.81 to 1. The eight largest counties, with 41.26 percent of the state population, were allocated twenty one senators, or 40.7 percent of the total. The twenty two largest counties, with 57.11 percent of the population were allocated 29.5468 senators, or 54.72 percent. The average district should contain 73,021 people based on the 1960 population of Georgia. Four out of the fifty four districts are below this average by more than 15 percent while two exceed it by more than 15 percent. Three districts depart from the average by more than 18 percent.[1] There was no appeal from this order nor was there any objection to the new plan of Senate apportionment.

The Supreme Court rendered its decisions on June 15, 1964 in *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; *WMCA, Inc. v. Lorenzo*, 1964, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568; *Maryland Committee for Fair Representation v. Tawes*, 1964, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595; *Davis. v. Mann*, 1964,

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[1] Meanwhile the Georgia County Unit System of elections for Governor and United States Senators had been voided. *Sanders v. Gray*, N.D. Ga., 1962, 203 F.Supp. 158, modified and affirmed, 1963, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. The ten Georgia congressional districts were redistricted by the legislature after the decision of this court in *Wesberry v. Vandiver*, N.D. Ga., 1962, 206 F.Supp. 276, was reversed on appeal, sub. nom. *Wesberry v. Sanders*, 1964, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481. This redistricting was accomplished by the General Assembly of Georgia, Ga. Laws, 1964, p. 478, and resulted in a maximum population disparity as between the new districts ranging from 16.4 percent below the desired average to 15.5 percent above the average. See *Toombs v. Fortson*, N.D. Ga., 1965, 241 F.Supp. 65 for this history.

377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609; *Roman v. Sinock*, 1964, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620; and *Lucas v. Colorado General Assembly*, 1964, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632, extending the one man-one vote principle to state legislative representation and apportionment, and to both houses in the case of bicameral legislatures. Plaintiffs then moved for additional relief on June 17, 1964 in the form of requiring reapportionment of the Georgia House of Representatives on the basis of population.

We granted relief on June 30, 1964 by voiding the apportionment section of the Constitution, Art. III, S III, par. 1, (Code Section 2-1501), and the Georgia House apportionment statute, Code Section 47-101, as conflicting with the Fourteenth Amendment. These were declared prospectively null and void after the general election to be held in 1964. The order, as previously noted, provided that the two year terms of the members of the House of Representatives elected at that time should be limited to one year, with the further provision that plaintiffs might apply for further relief in the event the House was not reapportioned in accordance with constitutional requirements during the regular session of the General Assembly which convened in January 1965. We also directed that the General Assembly enact the necessary statutes to provide for special elections during 1965 for one year House terms for the year 1966. The General Assembly reapportioned the House at this regular session, and it was this plan of apportionment which we considered in our last opinion and order. *Toombs v. Fortson*, supra. The special election was conducted and the members of the House are now serving the special one year terms and, as stated, the regular session of the Gen-

eral Assembly for 1966 has been completed. The apportionment of the House which we held to fall short of constitutional standards is depicted in the following table:

Percentage Departure From Norm	No. of Districts	Total Population of Districts
35-36.93% below	2	49,914
30-35% below	6	91,397
25-30% below	11	193,096
20-25% below	9	163,345
15-20% below	3	63,641
0-15% below	42	1,089,687
0-15% above	31	984,069
15-20% above	13	478,134
20-25% above	24	830,305

This plan brought the House from a theoretical minimum of 22.5 percent of population having a majority of the seats to 42.341 percent. The twenty two largest counties of Georgia's 159, having 57. 11 percent of the population, could elect 51.217 percent of the House members. The disparity between counties had been improved from a ratio of 98 to 1 under the old plan to 2.003 to 1 under the new plan. We stated that this plan still failed to meet the one man-one vote test, and pointed out that even a maximum variance of 15 percent, if in approvable form, would require a ratio not exceeding 1.353 to 1. The substantial progress made, and the need to adjust the 159 counties to the new system which required House districts wherein multiple counties were grouped in many instances, impelled us to grant the delay for a period of adjustment, trial and study.

SUMMARY OF FLORIDA LITIGATION

The following facts are taken from the jurisdictional statement filed by the plaintiffs in the Supreme Court in *Swann v. Adams*, supra, and from the District Court opinions rendered in the same litigation. *Sobel v. Adams*, S.D. Fla., 1962, 208 F.Supp. 316; *Sobel v. Adams*, S.D. Fla., 1963, 214 F.Supp. 811, *reversed sub. nom. Swann v. Adams*, 1964, 378 U.S. 553, 84 S.Ct. 1904, 12 L.Ed.2d 1033; *Swann v. Adams*, S.D. Fla., 1965, __F. Supp.__ (unreported); reversed, *Swann v. Adams*, 34 Law Week 3291, Supreme Court opinion dated June 25, 1966.

Under the legislative apportionment existing in Florida when the decision in *Baker v. Carr*, supra, was rendered, 12.3 percent of the State's population could elect a majority of the Senate and 14.7 percent could elect a majority of the House. The ratio of largest to smallest House District was over 100 to 1. This apportionment was held unconstitutional on July 23, 1962. *Sobel v. Adams*, 208 F.Supp. 316 (D.C. Fla., 1962). The Florida Legislature then convened in special session on July 24, 1964 and adopted a proposed constitutional amendment for submission to the people in November 1962, and enabling legislation for that amendment. This plan represented only a negligible improvement. It guaranteed each county at least one representative. The theoretical minimum for the House would have been raised only from 15 percent to 27 percent. For the Senate, the previous theoretical minimum of 12.3 percent remained between 12 and 13 percent. It was approved as constitutional by the District Court. *Sobel v. Adams*, supra, 208 F.Supp. 316.

The voters rejected this proposed plan in the November 1962 General Election, and elected senators and rep-

resentatives under the old system. Thus plaintiffs had received no relief to this date as distinguished from Georgia which had already reapportioned the Senate and held a special election in late 1962 so that the senators might serve under the new plan in 1963-64.

The Florida legislature then convened in special session in November, 1962 to no avail, but at a further special session a statutory reapportionment plan was adopted in January, 1963. This plan provided for a House in which the theoretical minimum was 27.4 percent, and a Senate in which the theoretical minimum was 14 percent.

According to the Florida statues annot., §§ 10.01 et seq., this statute increased the seats in the Senate from 38 to 43 and in the House from 95 to 112, and special elections to be held in 1963 for these extra seats provided a modicum of initial relief to plaintiffs to commence in the year 1964. On February 7, 1963, this act was upheld as a final apportionment. *Sobel v. Adams*, supra, 214 F.Supp. 811, and plaintiffs appealed.

On June 15, 1964, *Reynolds v. Sims*, and the related cases, supra, were decided by the Supreme Court. The 1963 decision in *Sobel v. Adams* was reversed on June 22, 1964 *sub nom. Swann v. Adams* and remanded "for further proceedings consistent with the views stated in *Reynolds v. Sims* . . . . " *Swann v. Adams*, 1964, 378 U.S. 553, 84 S.Ct. 1904, 12 L.Ed.2d 506. On July 20, 1964, the plaintiff moved to enjoin the placing on the November General Election ballot of a proposed constitutional amendment embodying the same 1963 legislative apportionment scheme just invalidated by the Supreme Court. The District Court declined to do so by an order dated

October 21, 1964. The amendment was rejected by the Florida voters on November 3, 1964. No action was taken on plaintiff's motion to require valid reapportionment despite urgent requests on the part of plaintiffs until January 8, 1965 at which time the court entered an order deferring further action so as to give the Florida legislature an opportunity to reapportion no later than July 1, 1965. It is well to reiterate that at this time the theoretical minimum in the House was still 27.4 percent and 14 percent in the Senate.

One special reapportionment session of the Legislature adjourned without result in June, 1965. Another was convened the same month, and a reapportionment plan was enacted on June 29, 1965. Under this legislation, the ratio of House districts varied by more than 4 to 1, and Senate districts by almost 2 to 1. The House districts ranged from 58 percent below the average to 69 percent above the average and the Senate districts from 23 percent below to 19 percent above the average. The elections under this plan were to be held as a part of the regular 1966 elections.

This legislation continued senators, elected in 1964, in office until November, 1968 even where their districts had been abolished.[2] The District Court rejected this provision. *Swann v. Adams*, 1965, (unreported). The legislation also provided that senators elected in 1964 would continue in office until November 1968 even though their districts had been expanded or contracted. One senator elected by 7 percent of the population of his new district

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[2] Florida senators are elected for four year terms while the term of Georgia senators are for two years. House members are elected for two years in both states.

would be so continued. The court did not reject this feature of the plan. We rejected a similar proposal in *Toombs v. Fortson*, supra, 1965, 241 F.Supp. 65. The legislation further provided that where more than one senator was assigned to a district of two or more counties, no two senators could reside in the same county until each county in the district had a senator. This was an effort to insure that each county had a senator. The Florida court approved this feature. We held an analogous Georgia provision unconstitutional in *Toombs v. Fortson*, supra, 1962, 205 F.Supp. 248. As to counties having more than one senator, only Dade was sub-districted, and the sub-districting was tailored to follow the lines of two congressional districts which had been declared unconstitutionally imbalanced in previous litigation in the same court. This provision was not rejected.

The plaintiffs had attacked this act on July 6, 1965. No hearing was held until November 2, 1965. A decision was rendered on December 23, 1965 declaring the apportionment unconstitutional, but approving it as an interim measure "for a period ending sixty days after the adjournment of the 1967 regular session of the Florida Legislature." Thus the 1966 elections for 1967-68 House seats and half of the four year senate seats (FSA 10.011), would go forward. The special features relating to the Senate received the disposition above noted. *Swann v. Adams*, supra, 1965. The prompt reversal by the Supreme Court followed with direction that the Florida Legislature be reapportioned on Constitutional standards in time for the 1966 elections.

The Georgia litigation is in marked contrast to the Florida litigation. The Florida Senate ratio under the 1965 plan is about the same but this came four years

after the Georgia Senate reapportionment. Moreover, the "grandfather" and residence features are sharp departures from the Georgia plan, and militate against true population apportionment. The House ratio is 4 to 1 as compared to Georgia's 2 to 1. This 1965 plan represented the first substantial relief the Florida plaintiffs had been accorded and it was to become effective only after the 1966 elections for legislative terms beginning in 1967. The Georgia plaintiffs obtained almost complete relief in the Senate in 1962 effective in January, 1963. They obtained substantial relief in the House in 1965 effective in January, 1966.

In addition, it is not without significance that the Florida District Court had been under a mandate of the Supreme Court since June 22, 1964 to apply *Reynolds v. Sims* to the Florida legislature. The Georgia plaintiffs have never appealed from the relief accorded them, nor have they ever complained of the Senate apportionment. The court refused, *sua sponte,* to approve the Senate apportionment as not altogether within constitutional standards. No one has remotely suggested that this court has not acted with dispatch at all junctures of this litigation. The Florida plaintiffs have had the burden of delay in the court as well as in the Legislature.

This court invoked its equity power in accepting the Georgia plan to the extent deemed necessary to preserve and strengthen the legislative branch of the Georgia government with only a slight withholding of relief to plaintiffs. We deemed this discretionary measure to be a wise and proper course in the interest of plaintiffs and the state. This is still our view. We do not believe to now so hold will be an abuse of discretion in view of the differ-

ence in the facts of this litigation and the Florida apportionment litigation.

Being constrained to the view that there has been no interferring authority or fact which requires that we vacate our order of April 1, 1965 in this matter, it will stand except as modified hereinafter as to time.

Paragraph I of our Order of April 1, 1965 now provides in pertinent part:

> "... The present apportionment of the Senate and the proposed apportionment of the House are approved as interim plans of apportionment for the period ending with the end of the regular session of the General Assembly of Georgia for 1968 or May 1, 1968, or whichever date may be earlier; ..."

This Order is directed to affording complete relief beginning in January 1969. That date will stand but the order will be modified so as to require apportionment of the House and Senate in keeping with federal constitutional standards not later than May 1, 1967, to be effective for the regular elections in 1968. This will provide time for this court to pass on such plan or system as may be adopted, and for any appeal from such order as may be entered. To afford complete relief in 1967 for 1968 will require another special election for one year Senate and House terms and we do not believe such a requirement to be indicated under all the facts and circumstances.

ORDER

The premises considered, it is decreed, ordered and adjudged as follows:

I.

Paragraph I of the Order in this matter of April 1, 1965 is deleted in its entirety and the following paragraph is substituted in lieu thereof:

"The present plan of Senate apportionment in Georgia and the proposed plan of apportionment for the House of Representatives, separately and collectively, fall short of the mandate of the equal protection clause of the Fourteenth Amendment as construed by the Supreme Court in *Reynolds v. Sims* and related cases, supra. The present apportionment of the Senate and the proposed apportionment of the House are approved as interim plans of apportionment for the legislative term 1967-68; without prejudice however to the right of the General Assembly of Georgia at any earlier date to alter the apportionment in either or both the Senate and House so as to more nearly comply with the subsisting constitutional requirement; and provided however that both the Senate and House must be apportioned in accordance with federal constitutional standards not later than May 1, 1967, with such apportionment to be effective for the regular 1968 elections."

II.

In all other respects the Order is reaffirmed. The motion for further relief is DENIED.

It is so ORDERED. This 25 day of March, 1966.

/s/ ELBERT P. TUTTLE
United States Circuit Judge

/s/ GRIFFIN B. BELL
United States Circuit Judge

/s/ LEWIS R. MORGAN
United States District Judge

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1205

Henry Toombs, Mrs. George Taylor Douglas, Gordon G. Johnson and John L. Glenn

vs.

Ben W. Fortson, Jr., as Secretary of State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM WITH SUPPORTING BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1205

HENRY TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON AND JOHN L. GLENN

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court, and move the Court to affirm the judgment from which the appeal in the above-styled case was taken, on the ground that the questions are so unsubstantial as not to warrant further argument or consideration.

April, 1966.

ARTHUR K. BOLTON
Attorney General

G. ERNEST TIDWELL
E. FREEMAN LEVERETT
PAUL L. HANES
GERALD H. COHEN

Attorneys for Appellees

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1205

HENRY TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON AND JOHN L. GLENN

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF SUPPORTING MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

This appeal constitutes an effort by the Appellants to have this Court review and reverse an order of the Three-Judge District Court in the Northern District of Georgia originally entered over a year ago, on April 1, 1965.

The Appellees are unable to accept either the accuracy or the completeness of Appellants' statement of the case in their Jurisdictional Statement. Of primary importance is the fact that, contrary to Appellants' assertion, the Appellees have never conceded that the present Georgia Senate and House reapportionments, either separately or collectively, violate the constitutional guidelines as set forth by this Court. The Appellees have conceded that, on April 1, 1965, the lower Federal Court made an adjudication that Georgia's apportionment plans were constitutionally deficient, which adjudication the Appellees

have accepted, because of, among other reasons: (a) a desire to terminate this litigation; (b) a reliance upon and acceptance of the remedial provisions of the lower Court's order; and (c) the desire to achieve a greater degree of stability and order in state government, particularly, the legislative branch thereof.

On March 8, 1966, Appellants filed a motion in the District Court seeking a modification and amendment of that order of the District Court, dated April 1, 1965. In less than three weeks, on March 25, 1966, the Three-Judge lower Federal Court declined to modify its April 1, 1965, order in the manner and to the extent sought by Appellants. It is that March 1966 order refusing to modify the April 1965 order by which Appellants seek a review of the earlier order.

While this litigation involves the reapportionment of the Georgia General Assembly, the beginning chapter of Georgia's reapportionment story began in 1962 with the case of *Sanders* v. *Gray,* 203 F. Supp. 158 (N.D. Ga. 1962), in which the plaintiffs attacked Georgia's "county unit system" method of elections. Plaintiffs' efforts in that proceeding were successful, *Gray v. Sanders,* 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). As a result of the *Gray* case, Georgia is now holding all elections on a popular vote basis.

The instant litigation was commenced in the Northern District of Georgia in April 1962. The initial decision in this litigation is reported in *Toombs v. Fortson,* 205 F. Supp. 248 (N.D. Ga. 1962), wherein the Plaintiffs sought to have the Georgia General Assembly apportioned more nearly on the basis of population. The District Court acted promptly and legislative relief was equally as prompt in forthcoming. The Georgia General Assembly convened in special session and enacted a plan of reap-

portionment for the Senate wherein the disparities as between the largest and smallest senatorial districts were reduced from a ratio of 42.5 to 1 to 1.81 to 1, and in which the theoretical minimum necessary to elect a majority of Senators was raised from 21.4% to 48.2%. Beginning with the 1963 session of the Georgia General Assembly, the State Senate has been operating under this plan. No objection was filed and no attack was made by the Appellants upon this senatorial plan of reapportionment, and as a matter of fact, no questions as to the validity or acceptability of the senatorial plan were raised until three years later, 1965, after the Georgia House of Representatives also had been reapportioned. No prior appeal has ever been taken from any order involving senatorial reapportionment in Georgia.

In 1963, another suit was filed in the Northern District of Georgia, challenging the apportionment of Georgia's congressional districts, and this Court held in *Wesberry v. Sanders*, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481, (1964), that Georgia's system of apportioning congressional districts was invalid and unconstitutional. Again, immediate relief was forthcoming. During the 1964 session of the Georgia General Assembly, Georgia's ten congressional districts were revamped and a new plan of apportionment was passed and adopted. No exception or objection has ever been filed in an attempt to annul this latest and presently effective plan for congressional districting in the State of Georgia.

Within a matter of hours after this Court's June 15, 1964, set of decisions in the reapportionment cases, the Plaintiffs (Appellants) filed a motion in this then quiescent case in which they sought to have the Georgia House of Representatives reapportioned in accordance with said decisions. In that motion of June 1964, the

Plaintiffs did not make any attack on the senatorial plan of apportionment and sought no relief in that regard. In response, the Court below held Georgia's 3-2-1 plan of apportionment of the House of Representatives invalid and unconstitutional and allowed the 1965 session of the Georgia Legislature to undertake to reapportion the House. The 1965 session of the Georgia General Assembly adopted a plan of reapportionment for the Georgia House of Representatives, which plan was submitted to the lower Court for its approval. The Plaintiffs (Appellants) filed various objections, but it is interesting to note that none of their objections, in any way, sought to invalidate the senatorial plan of reapportionment. This latest plan of apportionment of the House reduced the disparities existing between the largest district and the smallest district from a ratio of approximately 100 to 1 to 2.003 to 1, and increased the theoretical minimum necessary to elect a majority of the House members from approximately 22% to approximately 42%.

In its April 1, 1965 order, the Court below declined to approve the House plan in full, but did accept it as an interim measure. At the same time the Court declared the senatorial plan of reapportionment invalid and unconstitutional, although the Senate plan was also accepted as an interim apportionment measure. General midterm elections for the reapportioned House were held in 1965, and the 1966 session of the Georgia General Assembly operated under the plan of apportionment for the House and the Senate which had been approved on an interim basis by the lower Federal Court.

Notwithstanding all the figures and statistics appearing in the Appellants' Jurisdictional Statement, certain significant voids exist. For example, if the population figures used by the Appellants and appearing in the lower Court's opinion are used, it is readily apparent that in

1962 the constituencies (Fulton and DeKalb Counties) which the Appellants purport to represent in this class action, received a substantial increase in representation in the State Senate, amounting to at least 8 additional members, an increase of at least 500 per cent. In 1965 these same constituencies received an additional 30 representatives in the reapportioned House, an increase of at least 600 per cent. That is, in 1962, the Appellants' senatorial representation was increased from 2 to 10, and in 1965, Appellants' house representation was increased from 6 to 36. To assert that these achievements are not substantial or that they are insignificant does a disservice to the lower Court and to the aims expounded by Appellants.[1]

[1] Contrary to the position taken by Appellants in their Jurisdictional Statement, there has been a basic and substantial revamping of the geographical areas which comprise the various constituencies of the House and Senate, indicating the extent to which population has controlled the makeup of such constituencies, and directly reflecting the tremendous shift and change in the electorate who choose the members of the State Legislature.

Under the 1962 Senate Reapportionment Plan, the 8 largest counties (with 1,626,734 people, or 41.25% of the State total) elect 21 senators, or 40.74% of the total Senate. The 22 largest counties (with 2,251,986 people, or 57.11% of the people) have 29.546 senators, or 54.72% of the Senate membership.

Prior to the 1965 House Reapportionment Act, 103 counties with 23.53% of the total population elected a majority of the House members (103). Under the 1965 House Reapportionment Plan, these same counties have only 55.583 House members, or 27.11% of the total House membership. The 110 smallest counties with 26.66% of the total population have 62.798 representatives, or 30.63% of the House members.

Urban counties (as defined and classified by the Bureau of the Census) with 54.195% of the population elect 102 members of the House, or 49.756% of the total House membership under the 1965 House Reapportionment Act.

The 110 counties which, under the 3-2-1 formula heretofore prevailing, were the most over-represented counties in the House of Representatives, elected 122 representatives, but contained only 28.9% of the population. These *same* counties now have only 68.38 representatives, or 33.4% of the total membership, and they do *not* have 103 seats as the Appellants have contended.

The plaintiffs in Florida promptly attacked that plan in July of 1965. The District Court did not hold a hearing until November 2, 1965. A decision was rendered almost two months later, on December 23, 1965, declaring the apportionment unconstitutional because of the ratios between the districts and the theoretical minimums, but approving it as an interim measure until sixty days after the adjournment of the 1967 regular session of the Florida Legislature. No reasons were given by the Court for allowing that unusual plan to be used on an interim basis. On February 26, 1966, this Court in a per curiam decision reversed the Florida District Court, and directed that the Florida Legislature be reapportioned on constitutional standards in time for the 1966 elections.

The 1965 Florida plan represented the first substantial relief in reapportionment to the people of Florida, and was to become effective only for legislative terms beginning in 1969. In contrast, in Georgia the plaintiffs obtained relief in the Senate in 1962, and obtained relief in the House in 1965. In addition, the unique features in the Florida plan were not present in the Georgia reapportionment legislation.

It is clearly apparent, from the meticulous manner in which this Court's opinion in *Swann* v. *Adams* pointed up the history of delay and frustration of legitimate goals, that this Court felt Florida was not equitably entitled to further time. In that decision on the particular facts before it, the Court stated that:

> ". . . We find no warrant for perpetuating what all concede to be unconstitutional apportionment for another three years."

The reversal in *Swann* v. *Adams* applies to Florida and Florida alone.

The decision in *Swann* v. *Adams* obviously is not a radical departure from settled principles of law relating to remedies in constitutional law cases. An opinion in a specific case, founded on the particular and unusual circumstances of that case, is not applicable and should not be applied to cases of essentially different circumstances. *Brooks* v. *Marbury*, 11 Wheat. 78, 6 L. Ed. 423 (1825). This of course is particularly true when short per curiam decisions are rendered, because such decisions often involve only a review of factual questions concerning nothing more than the discretion of the trial court. *Newmons* v. *Lake Worth Drainage District*, 87 So. 2d 49 (Florida, 1956); 14 *Am. Jur.* "Courts", Sec. 131, 1964 Cum. Supp. A study of the history of the Florida litigation demonstrates beyond a doubt that this Court merely felt that the Three-Judge District Court in Florida had grossly abused its discretion.

A study of the history of the Georgia litigation demonstrates beyond doubt that the Three-Judge District Court in Georgia has *not* abused its discretion in allowing the Georgia General Assembly to conduct business on an interim basis.

Even if the Appellants achieved the reapportionment they now seek, their constituencies would receive, at the most, an additional one and a fraction senators, and six representatives (based on the present size of each House). Appellants' efforts to overlook the 1962 relief (where the Appellants received an additional 8 senators), and the 1965 relief (where the Appellants received an additional 30 representatives) constitutes an effort to put "blinders" on the Court.

As will be seen below, the results Appellants seek will be forthcoming. Their complaint is that the District Court did not order immediate reapportionment, necessitating a special session of the legislature and special elections.

On March 8, 1966, after the adjournment of the 1966 session of the Georgia General Assembly the Appellants filed their motion to amend or modify the order of April 1, 1965, although some eleven months had elapsed since said order had been rendered. The Court below declined to order immediate reapportionment, but reaffirmed for specific reasons stated in its opinion, its order allowing the Georgia House and Senate to function on an interim basis. The Plaintiffs now prosecute this appeal purportedly based on the order of March 25, 1966, while it is actually an effort to appeal, for the first time, from the orders of the lower Court which were originally rendered in 1962 and 1965.

ARGUMENT

A. This Decision by the District Court, Reviewing Its Previous Order, Was Completely Consistent with Its Authority, as Delineated by the Supreme Court, to Mold an Appropriate Remedy, and Hence Could Not Possibly Constitute an Abuse of Discretion.

The decision of this Court which initially recognized the role of the courts in the field of legislative apportionment also emphasized the need for flexible remedies commensurate with the anticipated particularized circumstances of individual situations, and opposed relief of a rigidly standardized variety.

> "The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity."
>
> *Baker* v. *Carr*, 369 U. S. 186, 250, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1957), concurring opinion by Mr. Justice Douglas.

Later, the question of remedial relief in cases involving the apportionment of legislatures was considered in the case of *Reynolds* v. *Sims*, 377 U. S. 533, 585, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964):

> ". . . Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. How-

ever, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediate effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a Court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of the State election laws, and should act and rely on general equitable principles. With respect to the timing of relief, a Court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the Court's decree. As stated by Mr. Justice Douglas, concurring in *Baker* v. *Carr*, 'any relief accorded can be fashioned in the light of well-known principles of equity.' "[2]

The language quoted above demonstrates that the Federal District Courts, upon whom the task of adjudicating

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[2] The lower Court considered that the instant case fell within the definition and the meaning of "unusual" as used in *Reynolds* v. *Sims* quoted above. Moreover, this view apparently has been shared by the Appellants:

"Since the district court, in withholding immediate relief to the appellees *in this 'unusual case'*, provided a practical 'accommodation' that would not prevent the continued adoption of constitutional amendments on specific matters of importance to the state, it is apparent that the present injunctive order applied general equitable principles adapted to local conditions and carried out both the spirit and letter of this Court's directions in *Reynolds* v. *Sims*." (Italics added) See page 20 of the Motion to Affirm and Brief filed by the Appellees (Appellants here) in conjunction with the prior appearance of this case in this Court at the October 1964 Term, Case No. 300.

individual apportionment cases falls, should always attempt to shape the remedy to the circumstances of the particular situation, and impending elections are specifically mentioned as such a significant special circumstance as would make the postponement of full implementation of the Court's decision equitably desirable. The singling out of the election example, when seen in the full context of the above quoted decision, does not prevent the District Courts from considering as the opinion directs, "a variety of local conditions" in fashioning relief. Nothing in *Reynolds* v. *Sims* suggests that the District Courts have less than the normal remedial discretion exercised by them in other areas of adjudication involving claims which are equally compelling. In fact, the opposite is true.

There have been no subsequent directions forthcoming from this Court on the question of modes of relief, and the Court in a series of cases subsequent to *Reynolds* v. *Sims, supra,* stated that for the present, no further comments on the subject would be forthcoming. *YMCA* v. *Lomenzo* 377 U. S. 633, 655, 84 S. Ct. 1418, 12 L. Ed. 2d 568 (1964); *Maryland Committee* v. *Tawes,* 377 U. S. 656, 675-676, 84 S. Ct. 1442, 12 L. Ed. 2d 595 (1964); *Lucas* v. *The Forty-Seventh General Assembly,* 377 U. S. 713, 739, 84 S. Ct. 1472, 12 L. Ed. 2d 632 (1964); *Roman* v. *Sincock,* 377 U. S. 695, 710-712, 84 S. Ct. 1462, 12 L. Ed. 2d 620 (1964). There were, however, indications in these decisions that the question of whether to delay effectuation of full apportionment in order to prevent disruption of the election processes was a discretionary determination to be made by the District Court. The fact that within the last few weeks this Court has affirmed, in per curiam fashion, a lower Court decision postponing full congressional redistricting until after this year's Fall

election indicates that, barring flagrant action by a Court contrary to the constitutional principles involved, exercise of discretion by District Courts on remedial questions will stand as a final determination. *Drum* v. *Seawell, et al.*, — U.S. —, 34 U. S. L. W. 3339 (1966).

Although the lower Courts have not as yet been given specific directions for their adjudication of appropriate relief in reapportionment cases, prior expressions of this Court in other areas, many of them having aspects analogous to the problems of legislative apportionment, are applicable in this area.

In a decision involving other rights under the Equal Protection Clause of the Federal Constitution, it was stated that the implementation of the ruling could best be accomplished by the Courts closest to the particular local problems involved:

> "Because of their proximity to local conditions and the possible need for further hearings, the Courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to these Courts."
>
> *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, 299, 75 S. Ct. 753, 99 L. Ed. 1082 (1954).

Similarly, the proper relief in apportionment cases is greatly determined by practical consideration of local or particular conditions, and these lower Court decisions in such cases carry an extra presumption of validity beyond the normal assumption as to the soundness of any exercise by a District Court of its equitable discretion. *Associated Press* v. *United States*, 326 U. S. 1, 27, 65 S. Ct. 1416, 89 L. Ed. 2013 (1944).

In molding appropriate relief in a given case, the Dis-

trict Courts may balance the interests of the parties involved, and if one of the parties happens to be either the federal or local government, the Court may give particular attention to its problems in fashioning an applicable remedy. *Brown* v. *Board of Education of Topeka, supra*, at 300; *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad*, 363 U. S. 528, 531-532, 80 S. Ct. 1326, 4 L. Ed. 2d 1379 (1960); *Georgia* v. *Tennessee Copper Company*, 206 U. S. 230, 237-239, 27 S. Ct. 618, 51 L. Ed. 1038 (1907); *Central Kentucky Natural Gas Co.* v. *Railroad Com.*, 290 U. S. 264, 271, 54 S. Ct. 154, 78 L. Ed. 307 (1933):

> "In fashioning and effectuating the decrees, the Courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."
>
> *Brown* v. *Board of Education of Topeka, supra.*

Courts exercising their equity powers in molding relief can recognize the necessity of granting a reasonable time in which to comply with the decree so as to avoid hardship or injury to the various interests involved. *Central Kentucky Gas Co.* v. *Railroad Com., supra; Brown* v. *Board of Education of Topeka, supra; Scranton v. Drew*, 379 U. S. 40, 41-42, 85 S. Ct. 207, 13 L. Ed. 2d 107 (1964).

> "While giving weight to these public and private considerations, the Courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling. Once such a start has been made, the Courts may find that additional time is necessary to carry out the ruling in an effective manner."
>
> *Brown v. Board of Education of Topeka, supra.*

Georgia has made its start, a good start, and the District Court found that additional time is necessary to carry it out in an effective manner.

In light of the above analysis of the scope of the District Court's discretion in fashioning remedies in apportionment cases, it is unreasonable for Appellants to say that this District Court has, in its decision reviewing the relief granted them and in further modifying in their favor an order already favorable to their interests, so grossly abused its broad discretionary powers as to require reversal by this Court. *Wood* v. *United States*, 16 U. S. 342, 365, 10 L. Ed. 987 (1842); *Burns* v. *United States*, 287 U. S. 216, 222-223, 53 S. Ct. 144, 77 L. Ed. 266 (1932).[3]

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[3] Similar views to those expressed herein have been previously urged by Appellees [Appellants here] in their Motion to Affirm and Brief of the Appellees in Support of Motion, filed in the previous appearance of this case in this Court. See pages 5, 6, 7 and 8 of said Motion to Affirm and Brief, wherein Appellants refer to and quote from *Brown* v. *Board of Education*, 349 U. S. at 299-300, 75 S. Ct. at 756, and then state on page 8:

"It is an underlying assumption of Appellants [Appellees here], in their Jurisdictional Statement, that when the District Court has ordered reapportionment by a date fixed in accordance with *Reynolds*, it has exhausted its equity power and can take no further action in formulating its decree to protect the rights of parties or the public interest from irreparable injury during the interim. *We submit that any such assumption is contrary to both the letter and the spirit of the Reynolds decision. The traditional flexibility and capacity of a court of equity are not so restricted*, particularly when vindication of the admitted constitutional rights of a majority of the citizens of the state must continue to be postponed." (Italics and matter in brackets added.)

B. **The Decision of the Court in Swann v. Adams Is Not a Mandate to the States Requiring Legislative Reapportionment No Later Than 1966.**

This Court's recent per curiam decision in *Swann* v. *Adams* — U. S. —, 34 U. S. L. W. 3291 (1966), should not be misinterpreted as a new and inflexible rule of law for reapportionment cases generally. The actions of both the Florida Legislature and the Florida Three-Judge District Court are in no way similar to that of Georgia, and the equitable factors requiring the Supreme Court to order immediate reapportionment in Florida are obviously not present in this case. The first reapportionment decision in Florida was handed down on July 23, 1962. *Sobel* v. *Adams*, 208 F. Supp. 316 (D.C. Fla. 1962). At that time in Florida the ratio of the largest to the smallest House district was over 100 to 1. After the court decision, the Florida Legislature adopted a proposed constitutional amendment for submission to the people of Florida in November of 1962. As the Georgia District Court pointed out in its March 25, 1966 decision, that plan represented only a negligible improvement. The plan guaranteed each county in Florida at least one representative. The theoretical minimum for control of the House would have been raised only from 15% to 27%. That proposed plan was approved as constitutional by the District Court of Florida. *Sobel* v. *Adams, supra.* The people of Florida rejected that proposed plan in the November 1962 general election, and their legislators that year were elected under the old system. As of that date, Georgia had already substantially reapportioned its Senate and had held a special election under its reapportionment plan. Furthermore, the Appellants in this case apparently accepted this plan as constitutional. They did not appeal.

The Florida Legislature convened in a special session in November of 1962 to reapportion, but was unsuccessful. At a later special session in January of 1963, a statutory reapportionment plan was approved. In that plan, the theoretical minimum to control the House was 27.4%, and the theoretical minimum for the State Senate was 14%. That Act was upheld as an acceptable final reapportionment plan in *Sobel* v. *Adams*, 214 F. Supp. 811 (D.C. Fla. 1963). The plaintiffs in that case promptly appealed to this Court.

On June 15, 1964, *Reynolds* v. *Sims* and the related cases were decided by the Court. *Sobel* v. *Adams* was reversed on June 22, 1964, and remanded for further proceedings consistent with *Reynolds* v. *Sims*. *Swann* v. *Adams*, 378 U. S. 553, 84 S. Ct. 1904, 12 L. Ed. 2d 506 (1964). The Florida plaintiffs then moved to enjoin the placing on the November general election ballot of a proposed constitutional amendment embodying the same 1963 legislative apportionment scheme only recently invalidated by this Court. The District Court declined to grant the injunction on October 21, 1964, but the amendment was rejected by the Florida voters on November 3, 1964. No action was taken whatsoever on the Florida plaintiffs' motion to require valid reapportionment until January 8, 1965. At that time the Florida District Court entered an order deferring further action to give the Florida Legislature an opportunity to reapportion by July 1, 1965. An unsuccessful reapportionment session of the Florida Legislature was held in June of 1965. Another was then convened, and a reapportionment plan was enacted on June 29, 1965. Under this supposedly final legislation, the ratio of House districts in Florida varied by more than 4 to 1, and of Senate districts by more than 2 to 1. Elections under that plan were to be held as part

of the regular 1966 elections. In addition to the 4 to 1 ratio in the House districts, there were several unique features in the Florida plan. First, certain Senators whose constituencies were completely abolished by the reapportionment plan were nevertheless permitted to serve until November 1968. Even the District Court rejected that provision. *Swann* v. *Adams*, — F. Supp. — (D.C. Fla. 1965). Other Senators, whose districts had been altered or contracted, were also permitted to serve until November 1968, regardless of the fact that in some cases they had been elected by only a small fraction of the people they now purported to represent. One of those Senators had been elected by only 7% of the population of his new district. These interesting variations on the now discredited theme of virtual representation were not rejected by the Florida District Court. The plan further provided that where several Senators were assigned to a district of two or more counties, no two Senators could reside in the same county until each county in the district had a Senator. That was an effort to insure that each county had a Senator, regardless of its population. As to the larger counties having more than one Senator, only Dade County, containing the City of Miami, was subdistricted, and that subdistricting followed the lines of two congressional districts which had been previously declared unconstitutionally imbalanced in other litigation in the same Court. Those last two provisions were not rejected by the District Court in Florida. It was clear to this Court in *Swann* v. *Adams* that Florida, after numerous special sessions and court cases, and pronouncements of this Court, still sought to retain control of the state legislative processes in the rural counties of the State.

C. The Recent Case of Drum v. Seawell, Shows That Swann v. Adams Is Not a New Rule of Law Requiring Immediate Reapportionment.

In *Drum* v. *Seawell*, — U. S. —, 34 U. S. L. W. 3339, plaintiffs originally brought suit in 1965 to compel both legislative reapportionment and congressional redistricting in North Carolina. On November 30, 1965, a Three-Judge District Court entered an interlocutory order holding that the legislative apportionment and the congressional districting were unconstitutional. The General Assembly of North Carolina then met in special session and reapportioned the State Legislature and redistricted the congressional districts. The plaintiffs attacked that reapportionment legislation, and the District Court, after carefully examining the matter, held that the legislative reapportionment met constitutional standards, but that the congressional redistricting did not. The District Court noted in its opinion, *Drum* v. *Seawell*, — F. Supp. — (D.C. N.C. 1966), rendered on February 18, 1966, that pursuant to *Reynolds* v. *Sims*, stricter adherence to equality of population between districts is more required in congressional than in State legislative representation. The District Court held that the congressional districting was unconstitutional, but nevertheless, recognizing "the good faith effort of the Legislature to bridge the tremendous gulf which existed between the status quo and the constitutional requirements," permitted the congressional elections of 1966 to take place under the invalid congressional redistricting law. That of course meant that congressional districts would not be fully reapportioned prior to the January 1969 session of the United States Congress. After this Court's decision in *Swann* v. *Adams*, the plaintiffs in the North Carolina case made a motion for rehearing before the Three-Judge District

Court, based upon the decision in *Swann* v. *Adams*. As was pointed out on page 4 of the Appellees' Motion to Affirm in *Drum* v. *Seawell*, the plaintiffs grounded their petition for rehearing and their appeal to the United States Supreme Court solely upon the decision in *Swann* v. *Adams*. On April 4, 1966, this Court affirmed the North Carolina District Court's judgment in *Drum* v. *Seawell*.

The affirmance in the *Drum* case shows conclusively that *Swann* v. *Adams* laid down no unalterable rule of law that legislative reapportionment or congressional redistricting must be accomplished by 1966. There is little distinction in the legal principles involved in legislative reapportionment and congressional districting insofar as relief is concerned. The goal to be achieved, based upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, is one man — one vote. *Wesberry* v. *Sanders, supra*; *Reynolds* v. *Sims, supra*. In *Drum* v. *Seawell*, although it was clear that enough time was physically available for the North Carolina General Assembly to redistrict its congressional districts again, the District Court, relying on general equitable principles, allowed a somewhat unconstitutional plan to be used on an interim basis. The responsible performance of the State of North Carolina warranted such an order. The *Drum* v. *Seawell* case refutes Appellants' statement on page 12 of their Jurisdictional Statement that "Neither considerations of legislative convenience nor of judicial deference justify the postponement of valid reapportionment where the eminence of forthcoming elections does not make compliance with the constitutional standard impossible." While it was physically possible for North Carolina to again go into special session and redistrict, the District Court, in recognization of the equit-

able considerations involved, did not require them to do so. This Court affirmed that decision.

The State of Georgia, like North Carolina, has demonstrated its responsible performance, and the decision of the Georgia District Court should also be affirmed.

D. The Record in This Case Shows That Both the Three-Judge District Court and the Georgia General Assembly Have Acted Responsibly to Bring About a Fair, Effective State Legislature to Act in the Interest of All Georgians.

The Statement of the Case previously set forth shows the responsible manner in which Georgia has handled legislative reapportionment. The contrasts between the Georgia situation and the Florida situation are striking, and the Three-Judge District Court in Georgia, of course, recognized the dissimilarities. From the very outset, the Georgia case has been characterized by expeditious handling by both the Three-Judge District Court and the General Assembly. As pointed out in the decision of April 1, 1965, *Toombs* v. *Fortson,* 241 F. Supp. 65 (D.C. Ga. 1965), "The fault of both the Senate and House plans, if any, lies not in a lack of rationality, but in departures from the average to a prohibited degree." The District Court did not hold, in 1965, that the House and Senate plans were unconstitutional because of "glaring disparities" but rather held that while substantial progress had been made, reapportionment fell somewhat short of the one man—one vote standard. The Court allowed the reapportionment plans to be used on an interim basis because:

> "This will afford an opportunity to the Legislature as now approved for the remainder of this term to observe the workings of the body in which for the first time there will be multi-county representatives and increased representation for many counties. Such study may add materially to the skill brought to bear in the following session of the General Assembly in finally bringing the membership within constitutionally acceptable standards. It will, among other things, afford

an opportunity to test the joinder of counties as to the various factors of compatibility heretofore referred to, and it will afford an opportunity to consider the relative merits of county-wide versus district representation in multi-district counties. *It may, in sum, permit a much more objective and more scientific solution to the difficult problem that remains to be resolved.*" (Italics added.)

Toombs v. *Fortson, supra at 71.*

In contrast to the Florida District Court's decision in *Swann* v. *Adams,* the Three-Judge District Court in Georgia felt that certain factors warranted an interim period, and set forth these factors. The Court recognized the interests of both plaintiffs and defendants in achieving an objective and scientifically sound apportionment of the Legislature which could function in the best interest of all. The Court also recognized that the legislative process is a complex and involved one and that Georgia was undecided as to whether heavily populated counties should have multiple representation or should be divided into districts. An interim period was allowed so that new legislators from urban districts could become proficient in the art of legislation, and so that the Legislature and the State could study its political subdivisions, balance the interests of those in different areas, and enact final legislation which would be in the best interest of the people. The lower Court did not subvert the one man —one vote principal to reasons of political convenience; rather it allowed an interim period to further the goal of a properly apportioned Legislature. These Appellants failed to appeal from the order of the Court of April 1, 1965, and the Appellees naturally assumed that the pro-

visions of the order of the District Court allowing time for readjustment were acceptable to them.[4]

The only question before the Court in this appeal from the District Court's opinion and order of March 25, 1966, is whether or not the District Court abused its discretion in only partially modifying its order of April 1, 1965. The Court did modify its order to provide that reapportionment legislation must be enacted by May 1, 1967, rather than by May 1, 1968. This date was moved up to provide time for the District Court to pass on the plan or system which will be adopted, and to allow a timely appeal from such order as may be entered, if an appeal is necessary. The Court below pointed out that to further modify the order would require another special election for one-

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[4] The derogatorily labeled "distorted philosophy" referred to and complained of on page 7 of Appellants' Jurisdictional Statement, seems to be startlingly similar to a theory propounded by the Appellants at the June 19, 1964 hearing before the lower Court, and which was then referred to and described by Appellant's counsel by the approving label of "provisional reapportionment". That hearing was conducted after the June 15, 1964 reapportionment decisions and the result, which the Appellants now so stoutly condemn, was in fact suggested by the Appellants; i.e., the use of the Georgia Senate plan as the basis for the reapportionment of the Georgia House. See transcript of the proceedings of June 19, 1964, pages 26 and 27. As a matter of fact, Appellants' counsel went even further and recognized the acceptability of an interim period with full and complete reapportionment to come, as described by their counsel, "later" (and not "next year" as one might have expected). See page 45. At page 99 of the same June 19, 1964 transcript, counsel for Appellants, in referring to the reapportioned Senate, stated as follows:

> "We feel the results we have achieved two years ago and as the State itself admitted were *most wise* and *most sound* and they were done with proper *expedition*." [Italics added.]

Thus, it seems clear that any use of the senatorial reapportionment plan as a guide for the reapportionment of the Georgia House, on an interim basis, has not only received the tacit but express approval of these Appellants.

year Senate and House terms, and that such requirements were not indicated under the facts and circumstances of the case. In its opinion of March 25, 1966, the Court, after comparing the Florida and Georgia litigation and legislation, held that:

> "This court invoked its equity power in accepting the Georgia plan to the extent deemed necessary to preserve and strengthen the Legislative branch of the Georgia government with only a slight withholding of relief to plaintiffs. We deemed this discretionary measure to be a wise and proper course in the interest of plaintiffs and the State. This is still our view. We do not believe to now so hold will be an abuse of discretion in view of the difference in the facts of this litigation and the Florida apportionment litigation."

The District Court in Georgia did not abuse its discretion.

The Appellants on pages 18 and 19 of their Jurisdictional Statement have set forth reasons which they feel require immediate and further reapportionment of the Georgia General Assembly. They maintain that because the new Governor is to be elected for a four-year term in November of 1966 that the "issues and platforms of candidates will necessarily have to be related to the composition of the malapportioned Assembly." Of course, State-wide officers, such as the Governor of Georgia, are elected on a straight population basis, and it is difficult to understand how the gubernatorial campaign could possibly be related to the composition of the presently apportioned General Assembly. As both Houses of the General Assembly have already been reapportioned once, there would be only a slight additional number of seats given to districts under any further apportionment. There would be absolutely no shift of any political significance

in the Georgia Senate, as the statistics show that the questionable ratio between Senate districts is caused by a few isolated imbalanced urban areas. That is to say, the composition of the State Senate would not shift on any basis such as from a rural composition to an urban one. Therefore, it is difficult to see what relation, if any, State-wide campaigns or prospective legislative programs have to the issues in this case.

E. The Doctrine of Law of the Case Is Applicable to This Case.

The decision of the District Court should be affirmed for the additional reason that the Court's order of April 1, 1965, became the law of the case by virtue of the Appellants' failure to appeal. The doctrine of law of the case, in the federal system, applies both to decisions made by the trial court and by the appellate courts. 1 B Moore's Federal Practice, § 404(1), p. 402. While it is true that the doctrine of law of the case does not have the effect of res judicata, it should be applied unless it can be shown that the party opposing a motion seeking a modification of an order has not relied reasonably upon the prior order of the court. The doctrine of law of the case in the federal system was defined by this Court in *Southern Railway Company* v. *Cliff*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283 (1922), as follows:

> "The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res judicata. One directs discretion; the other supersedes it and compels judgment."

The facts and law in the case of *Toombs* v. *Fortson* clearly demonstrated to the Court below that its prior decision should stand. The slight modification of the April 1965 decision, in the order appealed from in this case, actually represents a reaffirmation of the earlier ruling. The April 1965 order specified as its goal a full and proper reapportionment for the 1968 elections. By modifying its order to provide for the enacting of the final plan by May 1, 1967, well in advance of, and to apply to the 1968 elections, the Court below insured the objective of its April 1, 1965 decision. This is the law of this case.

Georgia has been involved in reapportionment since 1962. The General Assembly of Georgia has acted in good faith to reapportion itself. The District Court noted that substantial progress has been made. It would serve no useful purpose to require immediate reapportionment at this time. This is an election year in Georgia not only for members of the General Assembly, but for State-wide officers as well. The political parties will shortly accept notices of candidacy for primaries in September. Final relief in the area of legislative apportionment has been guaranteed by the lower Court's decision of April 1965, and that guarantee was reaffirmed by its decision of March 1966. In *Western Fire Insurance Company* v. *University City*, 124 F. 2d 698, 699 (8th Cir. 1942), the Court stated:

> "True, the doctrine of the law of the case is a rule of practice and not a limitation of power, yet it will not, except for very cogent reasons, be departed from."

No such cogent reasons were shown in the motion filed by the Plaintiffs. This court, in *Reynolds* v. *Sims*, left the District Courts great latitude in formulating appropriate relief. The Court below has ordered relief which is fair to the Plaintiffs. If the Plaintiffs are aggrieved now, they were aggrieved when the District Court's decision was handed down in 1965, and an appeal should have been taken at that time. To strike down the District Court's plan of relief at this time would thoroughly disrupt the regularly-scheduled election processes of the State of Georgia. The motion below showed no compelling reason why the doctrine of the law of the case should not be applied. The doctrine of law of the case, "Like stare decisis, should be applied that substantial justice is done in the cases that are being decided." *Moore and Oglebay*, "The Supreme Court, Stare Decisis and Law of

the Land" (1943) 21 Tex. L. R. 514, 553. The Appellees have relied upon the lower Court's decision of April 1, 1965. The machinery for the election of a new General Assembly has already been set in motion. Registrars and local political subdivisions are preparing electors lists for the upcoming primaries and elections. Individual potential candidates are studying their districts, assessing their chances, obtaining necessary financial support, all looking to the 1966 elections. To paraphrase the Appellants, the "issues and platforms of candidates will necessarily have to be related to" existing apportionment. As was stated in *White* v. *Higgins*, 116 F. 2d 312, 317 (1st Cir. 1940):

> "Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent a manifest injustice."

The District Court's order of April 1, 1965, and the subsequent partial modification of March 25, 1966, have brought about substantial justice, not a "manifest injustice." In fact, it is the other way. It would be "manifest injustice" to disrupt a court order on which reliance has been placed for over a year, with no appeal pending.

CONCLUSION

Well established principles of equity call for the affirmance of the decision of the Court below. The order of the District Court attacked by the Appellants was rendered over one year ago. If an appeal had been taken from that order in a timely manner this Court would have, in all probability, rendered a decision prior to the 1966 session of the General Assembly. Had that happened, the General Assembly, in regular session, would have been able to consider any matters presented by such a decision.

At this time, however, several harsh alternatives will be presented to the State of Georgia if this Court rules that the District Court abused its discretion. Another special session of the Legislature will have to be called, and this session would conflict with the election campaigns of legislators, as well as all other State and local officers, to be held in November of 1966. Such a special session would also place an unnecessary additional financial burden on the taxpayers. The only other alternative would be reapportionment by the District Court.

The Appellees have relied upon the order of the District Court of April 1, 1965, for a period of over one year. Contrary to a statement in the Appellants' Jurisdictional Statement, the Appellees have never conceded the unconstitutionality of either the Senate or the House reapportionment plans. While both of these plans have been found by the District Court to be constitutionally deficient, the Appellees, seeking to end litigation, chose not to appeal. In order to attain some degree of stability and certainty in state government, the State of Georgia waived its right to appeal in 1965 and thus has accepted the adjudication of the issues by the Federal District

Court. By a belated motion, appellants have sought to reopen the litigation.

In order to achieve the best reapportionment plan, additional time for study will be a significant aid in obtaining the ends desired. The District Court recognized this in its decision of March 25, 1966, by ordering that final reapportionment legislation be enacted by May 1, 1967, so that the plan may be studied and challenged if necessary prior to the regular 1968 elections. Surely a natural and orderly transition is more to be desired, and is more consonant with principles of equity, than any immediate mathematical solution as called for in this Appeal.

The Appellees and the Georgia Legislature have met in good faith every test which has been presented to them, and have achieved a degree of equality in representation perhaps not yet achieved by any other state in the Union. The only issue before this Court in this Appeal is whether or not the Three-Judge Federal District Court in its decision of March 25, 1966, abused its discretion in only partially modifying its order of April 1, 1965. The Appellees submit that not only was that discretion not abused, but that it was in fact well exercised. It is respectfully submitted that appellees' Motion to Affirm should be granted.

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PROOF OF SERVICE

I, E. FREEMAN LEVERETT, attorney for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1966, I served copies of the foregoing Motion to Affirm with Supporting Brief on the Appellants herein named, by mailing copies thereof in duly addressed envelopes, with postage prepaid to Francis Shackelford, Edward S. White, Emmet J. Bondurant, II, Israel Katz, and Hamilton Lokey, attorneys of record for said Appellants.

E. FREEMAN LEVERETT

END